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Office - Supreme Court, U.S.
FILED
MAR 20 1954
HAROLD B. WILLEY, Clerk

NO. 281, MISC.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

ROBERT LEE CANNON,
Petitioner,

v.

O. B. ELLIS, General Manager of
The Texas Prison System
Huntsville, Texas,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS OF
TEXAS

BRIEF FOR RESPONDENT IN OPPOSITION

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Capitol Station
Austin, Texas

March 19, 1954.

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Texas Court of Criminal Appeals, October 9, 1953, in Ex parte Cannon has not been reported. The same is quoted in its entirety as follows:

> "Petitioner attacks the Indictment and Sentence by virtue of which he is confined. All of the questions raised should have been brought to this Court on appeal.
>
> "We have examined the documents accompanying the petition and find them to conform to Article 63, P.C., and the holdings of this Court.

"The relief prayed for is denied."

JURISDICTION

Petitioner is invoking the jurisdiction of this Honorable Court under the provisions of 28 U.S.C., Sections 1254(1), and 1257(3).

QUESTIONS PRESENTED

1. Whether Petitioner has properly invoked the jurisdiction of this Court.

2. Whether this Court should review the decision of a state court which was predicated solely on grounds of state procedure.

3. Whether the allegation of Petitioner that he was indicted, tried, and convicted on a charge of "Habitual Criminal - Burglary" has any foundation in truth and in fact.

4. Whether a federal question is presented.

STATUTE INVOLVED

Article 63 of the Texas Penal Code (Vernon 1948), reads as follows:

> "Whoever shall have been three times convicted of a felony less than capital shall on such third conviction be imprisoned for life in the penitentiary."

STATEMENT OF THE CASE

On August 9, 1946, Petitioner was duly and legally indicted for the felony offense of burglary. The indictment also set out two previous convictions of Petitioner for felonies less than capital. Petitioner was tried before a jury in the Criminal District Court No. Two of Harris County, Texas, on February 12, 1947, being Cause No. 57,369 in said court, and was convicted. In accordance with the mandatory provisions of Article 63, Texas Penal Code (supra), Petitioner's punishment was assessed at confinement in the State Penitentiary for life.

No appeal was taken by Petitioner to the Court of Criminal Appeals of Texas, the court of last resort in criminal cases in the State of Texas.

During the October Term, 1953, Petitioner filed with the Court of Criminal Appeals of Texas an application for writ of habeas corpus being Ex parte Cannon (supra) Application No. 68 in said court, in which Petitioner attacked the indictment and sentence by virtue of which he is now confined, and attempted to raise certain questions relating to due process under the Constitution and laws of Texas and the United States. On October 9, 1953, the Court of Criminal Appeals of Texas denied Petitioner's application for writ of habeas corpus. Petitioner has filed his petition in forma pauperis to this Honorable Court for a writ of certiorari to the Court of Criminal

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Appeals of Texas to review the decision of that court. This Honorable Court has granted Respondent herein an extension of thirty (30) days and an additional extension of fifteen (15) days within which to file Respondent's brief in opposition to said petition. Respondent herewith files this brief in opposition to said petition within the time allowed by this Court.

ARGUMENT

I.

PETITIONER HAS NOT PROPERLY INVOKED THE JURISDICTION OF THIS COURT

The provisions of 28 U.S.C., Section 1254(1), pertain solely to Federal Courts.

Petitioner has not complied with the requirements of 28 U.S.C., Section 1257(3), in that Petitioner has either failed or refused to affirmatively show by the record that the questions he now seeks to have this Honorable Court review were properly raised in the trial court and ruled on and were thereafter properly raised before the Court of Criminal Appeals of Texas and ruled on, which showing by Petitioner is required by the provisions of Rule 12(1), Revised Rules of the Supreme Court of the United States (1950), and by the decisions of this Honorable Court, which decisions are hereinafter set out in the argument of Respondent.

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Further, this Honorable Court does not have jurisdiction to review the questions presented by Petitioner for the reason that Petitioner has either refused or failed to properly raise said questions in the Court of Criminal Appeals of Texas in accordance with the State rules of practice and procedure. The decision of the Court of Criminal Appeals of Texas (supra), which Petitioner now complains of, was predicated solely on the ground that the questions raised by Petitioner before that court should have been brought to that court on appeal in accordance with the rules of practice and procedure of this State.

II.

THE DECISION BELOW IS PREDICATED SOLELY ON GROUNDS OF STATE PROCEDURE

This Honorable Court has firmly adhered to the doctrine that where the questions were not properly raised in accordance with State procedure, jurisdiction will be declined, both where the highest State court refuses to decide the federal questions for this procedural reason, Pennsylvania R. Co. v. Illinois Brick Co., 297 U.S. 447 (1936); Erie R. Co. v. Purdy, 185 U.S. 148 (1902), and where the highest State court is completely silent on the federal question, Mutual Life Insurance Co. v. McGrew, 188 U.S. 291 (1903).

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In the case of John v. Paullin, 231 U.S. 583 (1913), this Honorable Court held:

> "Without any doubt it rests with each state to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law."

In his brief in support of his petition in this case Petitioner cites the case of Williams v. Kaiser, 323 U.S. 471 (1945). In that case the court also held:

> "It is a well established principle of this Court that before we will review a decision of a state court it must affirmatively appear from the record that the federal question was presented to the highest court of the State having jurisdiction and that its decision of the federal question was necessary to the determination of the cause." Citing: Honeyman v. Hanan, 300 U.S. 14 (1937), and Lynch v. New York, 293 U.S. 52 (1934).

Under the rules of procedure governing criminal cases in the Courts of the State of Texas, habeas corpus may not be employed or resorted to in lieu of an appeal. Ex parte Loper, 153 Tex.Crim. 240, 219 S.W.2d 81 (1949), certiorari denied 337 U.S. 946 (1949); Ex parte Napier, _____ Tex.Crim. _____, 246 S.W.2d 878 (1952); Ex parte Ranels, _____ Tex.Crim. _____, 237 S.W.2d 317 (1951); Ex parte Hubbard, 153 Tex.Crim.

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112, 218 S.W.2d 209 (1949); Ex parte Huddleston, 149 Tex. Crim. 388, 194 S.W.2d 401 (1946); Ex parte Meadows, 149 Tex. Crim. 86, 191 S.W.2d 731 (1946); Ex parte Ricketts, 148 Tex. Crim. 569, 189 S.W.2d 872 (1945); Ex parte Minor, 146 Tex. Crim. 159, 172 S.W.2d 347 (1943); Ex parte Clinnard, 145 Tex. Crim. 460, 169 S.W.2d 181 (1943); Ex parte Johnson, 137 Tex. Crim. 144, 128 S.W.2d 805 (1939); Ex parte McGruder, 135 Tex. Crim. 673, 122 S.W.2d 633 (1938); Ex parte Johnson, 131 Tex. Crim. 438, 99 S.W.2d 598 (1936); Ex parte McCuistian, 131 Tex.Crim. 360, 99 S.W.2d 310 (1936); Ex parte Meers, 129 Tex. Crim. 465, 88 S.W.2d 100 (1935); Ex parte Leifeste, 127 Tex. Crim. 445, 77 S.W.2d 675 (1934); Ex parte Lovel, 101 Tex.Crim. 576, 276 S.W. 428 (1925).

In the case of Ex parte Eason, 154 Tex.Crim. 517, 229 S.W.2d 73 (1950), the Court held that habeas corpus was not available to effect release of a prisoner given a life sentence under Article 63 of the Texas Penal Code, and his punishment as an habitual criminal followed as a matter of law, where he had been convicted of forgery after two previous convictions of felonies less than capital.

In the instant case the Petitioner could have brought the matters of which he now complains directly before the Court of Criminal Appeals of Texas by an appeal. This he declined to

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do for reasons which he does not disclose. Respondent respectfully points out to this Honorable Court that Petitioner was not a young, untainted soul, unaware of his rights to appeal the conviction of which he now complains. This conviction was the third conviction of Petitioner in the Texas courts for felony offenses. Respondent contends that Petitioner was well aware of his rights to appeal his conviction. Petitioner either failed or refused to appeal said conviction, and instead waited for six (6) years and then tried to set aside by habeas corpus a judgment and sentence which the trial court had the power to render and enter.

III.

PETITIONER'S ALLEGATION THAT HE WAS INDICTED, TRIED, AND CONVICTED ON A CHARGE OF "HABITUAL CRIMINAL - BURGLARY" IS TOTALLY UNFOUNDED AND UNTRUE

A certified copy of the indictment of which Petitioner complains is attached as "Appendix A". It is noted that the words "Habitual Criminal - Burglary" appear in the indorsement portion of the form used to record an indictment of the grand jury. However, Respondent respectfully points out to this Honorable Court that the indorsement section is filled in by the Clerk of the Court after the indictment itself has been returned by the grand jury and is placed in the Clerk's hands for filing purposes. The indorsement section of the form does not affect

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or change in any respect the indictment itself. Petitioner was tried only on the matters charged in the indictment returned by the grand jury. Petitioner had been previously convicted of two felonies less than capital. In order for the State to invoke the provisions of Article 63, Texas Penal Code (supra), it is necessary to allege such prior convictions in the indictment. Harrison v. State, 145 Tex.Crim. 386, 168 S.W.2d 243 (1943); Square v. State, 143 Tex.Crim. 493, 154 S.W.2d 852 (1941); Ellis v. State, 134 Tex.Crim. 346, 115 S.W.2d 660 (1938); Arnold v. State, 127 Tex.Crim. 89, 74 S.W.2d 997 (1934).

Therefore, the indictment which Petitioner complains of properly charged the Petitioner with the offense of burglary and also properly set out his two previous convictions of felonies less than capital.

The finding of the jury was as follows:

> "We, the Jury, find the defendant guilty of burglary of the house of M. S. Finer, as charged in the Indictment, and we further find that the defendant is the same person who was formerly twice convicted for forgery and felony theft in the manner and form as alleged in the Indictment, and that each of said offenses was committed and the defendant convicted therefor after the Judgment of Conviction thereon had become final as alleged in the Indictment."
>
> H. G. Neitsch. Foreman."

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Petitioner's punishment of imprisonment for life followed as a matter of law. Ex parte Eason, (supra).

IV.

NO FEDERAL QUESTION IS PRESENTED

This Honorable Court has firmly established the rule that it will review only those federal questions which were properly raised in the State courts in accordance with state procedures. Whitney v. California, 274 U.S. 357 (1927); Dewey v. Des Moines, 173 U.S. 193 (1899).

A decision of a state court resting on grounds of state procedure does not present a federal question. French v. Hopkins, 124 U.S. 524 (1888).

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN BEN SHEPPERD
Attorney General of Texas

JAMES N. CASTLEBERRY, JR.
Assistant Attorney General

Attorneys for Respondent.

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In the Name and by Authority of the State of Texas:

The Grand Jury of Harris County, State of Texas, duly organized at the August Term, A. D. 19 46 of Criminal District Court No. 2 of said County, in said Court, at said term, do present that Robert L. Cannon, hereinafter styled defendant,

on or about the 9th day of August, A. D. 1946, in said County and State, ~~XXX~~ was then and there a person who had theretofore been convicted of two felonies less than capital, in this, to-wit:

The said defendant, on the 1st day of March, A.D. 1943, was duly and legally convicted of the offense of forgery in the Criminal District Court No. Two of Harris County, Texas, in cause No. 52896 on the docket of said court, styled the State of Texas vs. Robert Lee Cannon, and which said court had jurisdiction of said offense of forgery.

And after the judgment of conviction in said cause No. 52896 had become final, said defendant comitted the offense of theft of property over the value of fifty dollars, and on the 9th day of October, A.D. 1944, was duly and legally convicted of the said offense of theft of property over the value of fifty dollars in the District Court of Hutchinson County, Texas, in cause No. 1190 on the docket of said court, styled The State of Texas vs. Robert Lee Cannon, and which said court had jurisdiction of said offense of theft of property over the value of fifty dollars.

The Grand Jury aforesaid further present in and to said Court, at said term, that on or about the 9th day of August, A.D. 1946, in said county and State, and after the judgment of conviction in said cause No. 52896 and the judgment of conviction in said cause No. 1190 had become final, the said defendant, Robert L. Cannon, who is the same person so twice formerly convicted, did break and enter a house then and there occupied and controlled by M. S. Finer with the intent then and there to fraudulently take therefrom corporeal personal property therein being and then and there belonging to the said M. S. Finer from the possession of the said M. S. Finer without his consent and with the intent then and there to deprive the said M. S. Finer of the value of the same and to appropriate it to the use and benefit of the said Robert L. Cannon.

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THE STATE OF TEXAS, } R. J. LINDLEY
County of Harris } I, [illegible], Clerk of the Criminal District Court of Harris County, Texas,

do hereby certify that the foregoing is a true and correct copy of the original indictment presented by the Grand Jury, and now on file in said Court.

Given under my hand and seal of said Court at office in Houston, this 1st day of February, 19 54.

R. J. LINDLEY
[illegible]
Clerk Criminal District Court, Harris County, Texas
By [signature], Deputy

No. 57369

THE STATE OF TEXAS

vs.

Robert L. Cannon,

906 W. Terrell

INDICTMENT

HABITUAL CRIMINAL - BURGLARY

Bail, $ 2500.00

LANGSTON G. KING, Judge

Filed Oct 9 - 1946, 19

J. W. MILLS, Clerk
Criminal District Court, Harris County, Texas

By R. J. Lindley, Deputy

Witnesses: M. S. Finer, Box 56, Bellaire, Tex. 22546, or Finer's Phcy., 1813 W. Alabama
Oliver & Jones, K 32115
C. R. Weeks, Chief Police, Huntsville, Tex.
McGrew & Lott, Police Dept.
Erma M. Black, 708 St. Charles, C 0798
Mr. H. P. Lindley-Henke, Pillot's
Bailey & Walters, Police Dept

CARTRAM, STELLAR, HOUSTON

Maes # 147313
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